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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1969.

No. 369.

AMERICAN FARM LINES,
Appellant,

v.

BLACK BALL FREIGHT SERVICE, et al.,
Appellees.

No. 382.

INTERSTATE COMMERCE COMMISSION,
Appellant,

v.

BLACK BALL FREIGHT SERVICE, et al.,
Appellees.

On Appeal from the United States District Court for the Western District of Washington.

MOTION OF UNITED TRANSPORTS, INC., TO DISMISS OR AFFIRM.

United Transports, Inc., respectfully moves the Court pursuant to Rule 16 to dismiss the appeal herein or, in the alternative, to affirm the judgment of the District Court on the grounds that the questions presented are so unsubstantial as not to require argument.

POSITION OF THE UNITED STATES.

Significantly, the United States, acting through the Solicitor General, has filed in this Court a Memorandum in which it is stated in part:

> "The United States has not considered the issues involved in these cases of sufficient importance to warrant its seeking plenary consideration by this Court . . ."

QUESTIONS INVOLVED.

The Jurisdictional Statement of American Farm Lines in Case No. 369 presents two questions alleged to be involved, which questions are largely duplicated in the Jurisdictional Statement on behalf of the Interstate Commerce Commission in Case 382.*

The first of these raised is the question of the existence of an immediate and urgent need for the institution of the service under temporary authority sought by American Farm Lines, and the second deals with a procedural matter, the decision of which below was not in any wise determinative of the result reached by the District Court.

Whether the Interstate Commerce Commission reopened properly or improperly or whether at that time the matter was, or was not, administratively final, can be of no moment since the Interstate Commerce Commission did, in fact, reopen, did, in fact, receive new evidence, which evidence was, in fact, considered by the Interstate Commerce Commission and by the District Court, and which evidence the District Court found even with that last received did not clearly establish an immediate and urgent need for the service proposed.

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* As mentioned above, the United States filed a Memorandum but no Jurisdictional Statement.

Any fair reading of the evidence first received or that later received impels the reader inescapably to the conclusion that rather than there being a vacuum of service, or an inadequate service, or, in fact, an immediate or urgent need for new service, the evidence proved affirmatively the existence of ample service coupled with the existence of other service completely untried.

The purpose of setting forth in regulations governing applications for temporary authority certain specific criteria by which temporary authority applications are to be judged is to provide a set of guide lines of an unmistakable character, thereby assuring the Interstate Commerce Commission that when it acts on such an application, it does so on a firm basis which will underlie the statutory findings required to be made.

Failure to comply with the prescribed criteria simply results in a failure to provide a basis in proof.

Reduced to fundamentals, these criteria merely present the question how one can criticize as inadequate service that has not been tried, or how one can say that there exists an immediate and urgent need when the evidence shows to the contrary.

The candor of the Department of Defense is admirable, and no amount of rephrasing or glossing over by jurisdictional statements, by arguments, by innuendo or otherwise, can alter the effect of the statement first made in the letter of support dated April 30, 1968. In that letter the Department of Defense, among other things, said:

> ". . . The Department of Defense is not in a position to state that there would be insufficient or inadequate service without American Farm Lines . . ."

Indeed, there would not, and this is the essence of the District Court's findings which this Court should affirm.

CONCLUSION.

In light of the fact that the conclusions reached by the District Court are clearly correct as to pivotal matters and in light of the fact that the procedural question raised is of no moment, it is respectfully urged that the questions raised are not substantial and do not merit plenary consideration.

Respectfully submitted,

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